COPY

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1960

No. 373

ROY R. TORCASO, APPELLANT,

vs.

CLAYTON K. WATKINS, CLERK OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF MARYLAND

FILED AUGUST 31, 1960
JURISDICTION NOTED NOVEMBER 7, 1960

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[fol. 1]

IN THE COURT OF APPEALS OF MARYLAND

SEPTEMBER TERM, 1959

No. 199

ROY R. TORCASO, Appellant,

vs.

CLAYTON K. WATKINS, as Clerk of the Circuit Court for Montgomery County, Appellee.

Appeal from the Circuit Court for Montgomery County (Ralph G. Shure, Judge)

Appendix for Appellant

[fol. 2]

Law No. 9155

IN THE CIRCUIT COURT

FOR MONTGOMERY COUNTY, MARYLAND

ROY R. TORCASO, 3708 Brightview Street, Wheaton, Maryland,

vs.

CLAYTON K. WATKINS, as Clerk of the Circuit Court for Montgomery County, Maryland.

PETITION FOR WRIT OF MANDAMUS

To the Honorable, the Judges of said Court:

The petition of Roy R. Torcaso respectfully represents as follows:

1. That your petitioner is and was at all times material herein a citizen of the United States of America and is

and was at all times material herein a resident of Montgomery County, State of Maryland for more than two (2) years.

2. On or about June 11, 1959, your petitioner forwarded an application for a Commission as a Notary Public in and for Montgomery County, State of Maryland, to The Honorable Edward S. Northrop, State Senator for Montgomery [fol. 3] County, State of Maryland, requesting Senator Northrop's endorsement thereon.

3. The said application, dated June 3, 1959, was completely and properly filled out and contained all necessary signatures thereon.

4. On or about June 19, 1959, The Honorable Edward S. Northrop endorsed said application and forwarded it to the Office of The Governor of the State of Maryland.

5. On or about June 22, 1959, the Governor of the State of Maryland appointed your petitioner a Notary Public in and for Montgomery County, State of Maryland.

6. On or about June 22, 1959, the Office of the Secretary of State of Maryland notified your petitioner of his appointment and that his Commission had been mailed to the Clerk of the Court at the Courthouse of his County, and further directed him to appear at the Office of the said Clerk within thirty (30) days to obtain his Commission and qualify for office.

7. On or about June 25, 1959, your petitioner appeared in the Office of the Clerk of the Circuit Court for Montgomery County, State of Maryland, and stated that his purpose was to qualify for the Office of Notary Public in and for Montgomery County, State of Maryland, and to receive his Commission.

8. On or about June 25, 1959, in furtherance of the allegations contained in paragraph 7, above, Eleanor Campbell, Deputy Clerk of the Circuit Court of Montgomery County, State of Maryland, requested your petitioner to take and subscribe to the following oath and declaration:

[fol. 4]

STATE OF MARYLAND, MONTGOMERY COUNTY SS:

In the presence of Almighty God, I, Roy R. Torcaso, do solemnly promise and declare that I will support the Constitution of the United States; and that I will be faithful and bear true allegiance to the State of Maryland, and support the Constitution and Laws thereof; and that I will, to the best of my skill and judgment, diligently and faithfully without partiality or prejudice execute the office of

NOTARY PUBLIC OF
THE STATE OF MARYLAND
IN AND FOR
MONTGOMERY COUNTY

according to the Constitution and Laws of this State.

I, Roy R. Torcaso, do declare that I believe in the existence of God.

.....

Sworn to and subscribed before me, Clerk of the Circuit Court for Montgomery County, at Rockville, Maryland, this ..... day of ..... AD, 19.... .

TEST:

..... Clerk

9. On or about June 25, 1959, in reply to the said request of Eleanor Campbell, as contained in paragraph 8, above, your petitioner stated that he would not declare that he believed in the existence of God, whereupon the Clerk of the Court refused to issue to your petitioner his Commission as Notary Public in and for Montgomery County, State of Maryland.

[fol. 5] 10. Your petitioner is and was at all times material willing to take and subscribe the affirmation for the Office of Notary Public as contained in Article I, Section 6 of the Constitution of the State of Maryland, which section reads as follows:

"Every person elected or appointed to any office of profit or trust, under this Constitution, or under the laws, made pursuant thereto, shall, before he enters upon the duties of such office, take and subscribe the following oath or affirmation: I, ..., do swear (or affirm, as the case may be), that I will support the Constitution of the United States; and that I will be faithful and bear true allegiance to the State of Maryland, and support the Constitution and Laws thereof; and that I will, to the best of my skill and judgment, diligently and faithfully, without partiality or prejudice, execute the office of ....., according to the Constitution and Laws of this State • • • "

11. The duties of the Clerk of the Circuit Court for Montgomery County, State of Maryland, in this capacity is a matter in which there is no discretion whatsoever, his function therein being ministerial in nature.

12. The refusal of the said Clerk to issue unto your petitioner his Commission was in violation of the Laws and Constitution of the State of Maryland as well as the Laws, and Constitution, and its Amendments, of the United States of America (specifically, Article VI and the First and Fourteenth Amendments to the Constitution of the United States of America).

13. Your petitioner has no other adequate legal remedy to obtain the relief prayed for hereinafter.

14. And for other valid reasons to be advanced at the time of hearing on the petition.

[fol. 6] WHEREFOR, your petitioner prays as follows:

1. That a Writ of Mandamus be issued, directed to Clayton K. Watkins, as Clerk of the Circuit Court for Montgomery County, State of Maryland, commanding him to perform his duties as Clerk of said Court and render to your petitioner the Oath or affirmation as set forth in Article I Section 6 of the Constitution of the State of Maryland and upon your petitioner's swearing or affirming thereof, the said Clerk be further commanded to issue to

your petitioner his Commission as Notary Public in and for Montgomery County, State of Maryland.

2. That the Defendant be required to bear the costs of these proceedings.

s/

Roy R. Torcaso, Petitioner

Sickles and Sickles

By,

s/

Joseph A. Sickles
Attorneys for Petitioner
3400 Farthing Drive
Silver Spring, Maryland
WH 2-5763

s/

Bruce N. Goldberg
Attorney for Petitioner
4709 Montgomery Lane
Bethesda, Maryland
OL 6-4343

[fol. 7]
State of Maryland
County of Montgomery ss:

Before me, a Notary Public in and for the State and County aforesaid, personally appeared Roy R. Torcaso and did affirm that he has read the foregoing Petition, by him subscribed and that he has personal knowledge of the matters set forth therein and that they are true to the best of his knowledge and belief.

August 12 1959

s/ Richard A. Dompka
Notary Public
My Commission Expires 5/1/61

[fol. 8]

IN THE CIRCUIT COURT

FOR MONTGOMERY COUNTY, MARYLAND

[Title omitted]

DEMURRER

The Defendant, Clayton K. Watkins, Clerk of the Circuit Court for Montgomery County, Maryland, by his attorneys, C. Ferdinand Sybert, Attorney General and Stedman Prescott, Jr., Deputy Attorney General, demurs to the Petition filed by the Plaintiff herein, and to each and every paragraph thereof, and to each and every prayer for relief therein, for the reasons that the said Petition, and each and every paragraph thereof, and each and every prayer for relief therein, are insufficient in substance and in law, and for grounds therefor say:

[fol. 9] 1. That said Petition and each and every paragraph thereof fails to state a cause of action which would entitle the Plaintiff to the relief prayed.

2. That said Petition and each and every paragraph thereof fails to state the facts which would entitle the Plaintiff to relief in this Court.

3. That the action of the Clerk of Court was in accordance with the provisions of Article 37, Declaration of Rights, Maryland Constitution and, therefore, valid.

4. That the action of the Clerk of Court did not violate Article VI, and the First and Fourteenth Amendments to the Constitution of the United States.

5. And for other reasons to be assigned at the hearing upon this Demurrer.

.....

C. Ferdinand Sybert
Attorney General

.....

Stedman Prescott, Jr.
Deputy Attorney General
Attorneys for Clayton K. Watkins,
Clerk of the Circuit Court
for Montgomery County, Md.

We Hereby certify that we have mailed a copy of the within Demurrer to Bruce N. Goldberg, Esq., Attorney for the Plaintiff, at 4709 Montgomery Lane, Bethesda, Maryland, this 18th day of September, 1959.

.....

[fol. 10]

IN THE CIRCUIT COURT

FOR MONTGOMERY COUNTY, MARYLAND

ROY R. TORCASO,

Plaintiff,

vs.

CLAYTON K. WATKINS, Clerk of the Circuit Court for Montgomery County, Maryland,

Defendant.

MEMORANDUM OPINION AND ORDER

This is a Petition for a Writ of Mandamus filed by Roy T. Torcaso praying that Clayton K. Watkins, as Clerk of the Circuit Court for Montgomery County, Maryland, be commanded to issue to said petitioner his commission as a Notary Public in this State and County.

The defendant Clerk has filed a Demurrer through the Attorney General of Maryland and argument was had on this Demurrer on November 3rd, 1959, and Counsel for the petitioner and the Clerk have both filed briefs. Also the American Civil Liberties Union, as amicus curiae, has filed a memorandum in support of the petitioner's position, by permission of the Court. All briefs have been read, as have the cases cited, and the matter has been carefully considered.

[fol. 11] The petitioner alleges that he was refused his commission by the Clerk by reason of the fact that he would not take and subscribe the oath administered as follows: "In the presence of Almighty God, I, Roy R. Torcaso, do

solemnly promise and declare that I will support the Constitution of the United States; and that I will be faithful and bear true allegiance to the State of Maryland, and support the Constitution and Laws thereof; and that I will, to the best of my skill and judgment, diligently and faithfully without partiality or prejudice execute the office of Notary Public of the State of Maryland in and for Montgomery County according to the Constitution and Laws of this State. I, Roy R. Torcaso, do declare that I believe in the existence of God." He claims that the oath required is in violation of the Constitution of Maryland and of the United States of America. The office involved is one created by Statute and the petitioner concedes that such an office is one of profit and trust; the oath is one always administered for like positions, and there is no dispute as to the facts involved.

In Maryland, Article 37 of the Declaration of Rights is a restriction applicable to those who wish to hold a position of profit or trust in this State. This restriction is a qualifying condition and seems most assuredly to be one which may be rightly imposed by a sovereign state in dealing with its own officials. This is a test for qualification, as are tests for qualification in other states, and also in dealing with such matters as defense when accused of crime, marriage and divorce laws, qualification to practice a profession; likewise in enjoyment of such privileges as attendance at State Universities and the use of public school buses, matters within the police powers of the state, and those of internal administration. In dealing with subversive activities, our own case of Shub vs. Simpson at 196 Md. 177 clearly points out that Article 37 did not violate the oath [fol. 12] of office prescribed by the Constitution since it was simply a declaration showing qualification for office and not an additional oath.

Maryland is a State steeped in religious freedom, founded and guided by those who believe in the existence of God. The members of the Legislature from the date of our founding have imposed some religious restriction on the right to hold an office of profit or trust. First, in 1776 the Declaration of Rights, at Article 35 stated that "no other test of qualification ought to be required on admission to any office

of profit or trust than that of support and fidelity to this State and such oath of office as shall be directed by this Convention or the Legislature of this State and the declaration of belief in the Christian Religion". In 1851, at Article 34 of the Declaration of Rights, the restrictions were broadened to read, "and the declaration of belief in the Christian Religion; and if the party shall profess to be a Jew, his declaration shall be of his belief in a future state of reward and punishment", so that all faiths in addition to the Christian were then qualified. Now, any who believe in a supreme being may qualify. In the Convention of 1876, after much debate, all old provisions giving to the Legislature the right to exact oaths were deleted but the declaration of belief in the existence of God was retained so that Article 37 reads today as follows: "That no religious test ought ever to be required as a qualification for any office of profit or trust in this State, other than a declaration of belief in the existence of God; nor shall the Legislature prescribe any other oath of office than the oath prescribed by this Constitution." This matter is fully discussed in Davidson vs. Brice, 91 Md. 681, which is a case involving the office of County Treasurer of Anne Arundel County.

The office of Notary Public is an important one of profit and trust, and an entire Article of the Annotated Code of Maryland—Article 68—is devoted to this office and duties [fol. 13] included therein. A Notary issues oaths in accordance with the law, gives certificates, receives proof of acknowledgments of all instruments of commerce, navigation, deeds and other paper writings: he can issue protests and must keep official records of his accounts. His is a privilege, and it being solely an internal office, the people of Maryland have imposed a qualification of belief in the existence of God as a condition precedent to the taking of his oath. The foundation of such a requirement was made clear when the Constitution of Maryland was adopted by Convention in Annapolis. The Preamble to the Constitution reads as follows: "We, the People of the State of Maryland, grateful to Almighty God for our civil and religious liberty, and taking into our serious consideration the best means of establishing a good Constitution in this State for the sure

foundation and more permanent security thereof, declare:" (then follows Art. 1, etc.)

The Petitioner also argues that Article 37 violates the provision of the 1st and 14th Amendments to the Constitution of the United States. Suffice it to say, for reasons hereinbefore stated, the statutes which forbid acts detrimental to the community and place requirements for public office do not forbid religious beliefs, or even disbeliefs. The Complainant, Torcaso can continue his religious position without any interference from Maryland, either as to his present private employment or his citizenship, as neither is being interfered with.

The Court finds no conflict with the United States Constitution or the Constitution of Maryland and no authority having been cited to the contrary, the Court feels that Art. 37 of the Declaration of Rights of Maryland imposes a qualification that the petitioner has not met and his petition for Writ of Mandamus will be, and the same is hereby, denied and the Petition is hereby dismissed.

.....

Ralph G. Shure
JUDGE of the Circuit Court
for Montgomery County, Maryland

[fol. 14]

COURT OF APPEALS OF MARYLAND

[Title omitted]

STIPULATION AS TO RECORD

Pursuant to Rule 828 c, Maryland Rules of Procedure, Appellant and Appellee hereby stipulate and agree that the following extracts from the record will be included in Appellant's printed extract.

1. Petition for Writ of Mandamus
2. Defendant's Demurrer

[fol. 15] 3. Memorandum, Opinion and Order of the Circuit Court for Montgomery County that Petition for Writ of Mandamus is denied and Petition dismissed.

s/

Joseph A. Sickles
Attorney for Appellant
3400 Farthing Drive
Silver Spring, Maryland

s/

Stedman Prescott, Jr.
Attorney for Appellee
Deputy Attorney General

Carlton R. Sickles

s/

Carlton R. Sickles
Attorney for Appellant
3400 Farthing Drive
Silver Spring, Maryland

C. Ferdinand Sybert
Attorney for Appellee
Attorney General

s/

Bruce N. Goldberg
Attorney for Appellant
4709 Montgomery Lane
Bethesda, Maryland

[fol. 16]

IN THE COURT OF APPEALS OF MARYLAND

No. 199

September Term, 1959

ROY R. TORCASO,

v.

CLAYTON K. WATKINS, Clerk of the Circuit Court for Montgomery County.

OPINION BY HENDERSON, J.

Brune, C. J. concurs in the result.

June 30, 1960

[fol. 17] This appeal is from an order of the Circuit Court for Montgomery County dismissing a petition for mandamus against the Clerk of that court, after a demurrer to the petition had been sustained. The petition alleged, and the demurrer admitted, that the appellant, a citizen of the United States and a resident of Montgomery County for more than two years past, had been duly appointed by the Governor a notary public in and for that County, but when he went to the Clerk's office to obtain his commission and qualify for the office, the Clerk requested him to take and subscribe to a certain oath and declaration. The appellant declined to do so. Thereupon, the appellee refused to deliver the commission to the appellant, and suit followed.

The oath and declaration tendered to him read as follows:

"State of Maryland, Montgomery County ss:

In the presence of Almighty God, I, Roy R. Torcaso, do solemnly promise and declare that I will support the Constitution of the United States; and that I will be faithful and bear true allegiance to the State of Maryland, and support the Constitution and Laws thereof;

and that I will, to the best of my skill and judgment, diligently and faithfully without partiality or prejudice execute the office of

Notary Public of
The State of Maryland
In and For
Montgomery County

[fol. 18] according to the Constitution and Laws of this State.

I, Roy R. Torcaso, do declare that I believe in the existence of God.

.....

Sworn to and subscribed before me, Clerk of the Circuit Court for Montgomery County, at Rockville, Maryland, this ..... day of ..... AD, 19.... .

TEST:

..... Clerk"

The appellant stated that he was prepared to take the oath or affirmation prescribed by the Maryland Constitution, but refused to declare his belief in the existence of God.

The oath and declaration quoted above differs from that prescribed by Art. 1, sec. 6 of the Maryland Constitution, for all persons elected or appointed to "any office of profit or trust, under this Constitution, or under the Laws, made pursuant thereto," in two particulars. The prescribed oath, or affirmation, begins with the phrase "I, ...,, do swear, (or affirm, as the case may be,)", and it omits the separate declaration as to belief in the existence of God. It is conceded that the office of notary public is an office of profit or trust, referred to in Art. IV, sec. 45 of the Constitution, and dealt with in Code (1957), Art. 68, secs. 1-10. Sec. 1 provides that applicants shall "take the oath of office before the clerk of the circuit court for each of the counties in the State * * *." The reference here, as in Code (1957), Art. 70, sec. 7, is to the oath prescribed by the Con-
[fol. 19] stitution. Art. 37 of the Declaration of Rights provides:

"That no religious test ought ever to be required as a qualification for any office of profit or trust in this State, other than a declaration of belief in the existence of God; nor shall the Legislature prescribe any other oath of office than the oath prescribed by this Constitution."

In *Davidson* v. *Brice*, 91 Md. 681 (1900), this Court held that the Legislature had no power to require a different or supplemental oath of office, in the case of a county treasurer. Chief Judge McSherry, for the Court, said (p. 691): "Art. 37 does two things. It prohibits any religious test as a qualification for any office of profit and trust, other than a declaration of belief in the existence of God; and it prohibits any oath of office other than the one set forth in sec. 6, Art. 1, except as respects the Comptroller and Treasurer." But the opinion throws no light on the questions now raised. We may note in passing that the form of oath presented to the applicant, which did not follow the language of the Constitution giving him an option to swear or affirm, was improper. But the appellant's main contentions are (1) that a declaration of belief in the existence of God, although permitted by Article 37 as an exception to the general rule against the requiring of a religious test as a qualification for office, has never been put into effect by the Legislature, and (2) that, if the exception is self-executing under Article 37 of the Declaration of Rights, it [fol. 20] is invalid as in violation of the Fourteenth Amendment to the Federal Constitution.

On the first point, we must agree that there is no present Maryland statute implementing the exception stated in Article 37. Code (1957), Art. 70, sec. 9, provides: "It shall only be necessary for an officer who is required to take and subscribe the oath prescribed by the sixth section of the first article of the Constitution to declare orally at the time his belief in the Christian religion, or, if he profess to be a Jew, of his belief in a future state of rewards and punishments; and it shall be presumed that an officer who has taken and subscribed the oath made at the same time such declaration of belief." This section was enacted by Chapter 18, sec. 1, Acts of 1854, and has been included without change

in succeeding codifications, including those of 1860 and 1888, which, unlike other codifications, were not merely evidence of existing laws but legislative enactments of the matter therein contained. However, the section in question obviously referred to the religious tests set forth in the Constitution of 1851, which were deleted in the Constitution of 1867. The section makes no reference to belief in the existence of God, which is the only religious test now permitted. To the extent that sec. 9 refers to tests now forbidden, it can have no application in the instant case.

We think, however, that sec. 9 is significant for another reason. Its obvious purpose was to permit an oral declara-
[fol. 21] tion, and to raise a presumption of compliance with the constitutional requirements of belief in effect at the time of its enactment. In short, it assumed those requirements to be mandatory and self-executing, and merely undertook to prescribe the mode of compliance or the quantum of proof. Moreover, the language of all the constitutional provisions in effect prior to 1867 seemed to differentiate between the oath and the declaration. In the Declaration of Rights adopted in 1776, Art. 35 read: "That no other test or qualification ought to be required, on admission to any office of trust or profit, than such oath of support and fidelity to this State, and such oath of office, as shall be directed by this Convention, or the Legislature of this State, and a declaration of a belief in the Christian religion." Clearly, the Legislature was empowered to prescribe additional oaths of office, but there is no suggestion that the Legislature could dispense with the oath of support and fidelity, or the declaration of belief. Art. 34 of the Declaration of Rights of 1851 added a clause after the words "Christian religion" stating: "and if the party shall profess to be a Jew, the declaration shall be of his belief in a future state of rewards and punishments." Art. 37 of the Declaration of Rights of 1864 substituted a clause after the words "Christian religion," stating: "or in the existence of God, and in a future state of rewards and punishments", omitting the specific reference to Jews.

[fol. 22] In the proceedings of the convention of 1867, Article 37 of the Declaration of Rights was reported from the committee in the exact language of Art. 37 of the Dec-

laration of Rights of 1864. Mr. Brown advocated striking out of the constitution "any religious qualification whatever." Mr. Bernard Carter then submitted a substitute that was adopted: "That no religious test ought ever to be required as a qualification for any office of profit or trust in this State; nor shall the Legislature prescribe any other oath of office than the oath prescribed by this constitution." This was amended, on motion of Mr. Mackubin by adding after the word "State": "other than a [declaration of] belief in the existence of God." See Perlman, *Debates*, pp. 81, 173. In the context, and in the light of the historical development, we think the Convention was itself declaring that belief in the existence of God should be a qualification for office, but that no other religious test should be required.

We do not agree with the appellant that the word "ought" was used in a permissive sense. The word occurs repeatedly in the Declaration of Rights, in many instances to establish fundamental rights. It is a general rule that constitutional provisions are not given a directory construction. See *Archer* v. *State*, 74 Md. 443, 448. In *State* v. *C. & P. R. R. Co.*, 40 Md. 22, 50, Judge Alvey, with reference to the language of Art. 15, that every person "ought to contribute his proportion of public taxes * * * according to his actual [fol. 23] worth * * * ", said: " * * * this declaration of the right of the citizen is not simply directory to the Legislature, * * * it is a positive limitation or restriction on the power * * * ." It could hardly be contended, in the instant case, that Article 37 would permit the Legislature to impose religious tests other than belief in God. The real question is whether the one permitted test required further legislative action. We entertain no doubt on that score. The provision is complete in itself and needs no legislative enactment to carry it into effect or provide means for its enforcement. Cf. *Leser* v. *Lowenstein*, 129 Md. 244, 252. See also 11 Am. Jur., *Constitutional Law*, § 75.

We also attach significance to the fact that there appears to be a long and unbroken administrative construction, whereby a declaration of belief in God has been required as a qualification for office in Maryland. Unfortunately, the record does not disclose the contemporaneous practice in 1867. But the practice was clearly recognized by Attorney General Armstrong in 1922, when he ruled that it was neces-

sary that every official should be "required in some definite way" to declare his belief in the existence of God. 7 Op. Atty. Gen. 486.

We come, then, to the question whether the declaration in question violates the Federal Constitution. It is well settled that the provisions of the Federal Constitution are supreme, even over a provision of the State Constitution. *Baltimore Radio Show, Inc.* v. *State*, 193 Md. 300, 323. The [fol. 24] appellant does not contend that clause three of Art. VI of the Federal Constitution is applicable to the states. That clause, providing that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States," is plainly inapplicable. Nor is it contended that this clause could be imported into the Fourteenth Amendment. Obviously, Congress could not prescribe qualifications for state office, at least not so long as we retain a Federal form of government. However, it is well settled that the First Amendment, providing that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, * * * ", is applicable to the states through the Fourteenth Amendment, as a deprivation of "life, liberty, or property, without due process of law", or a denial of "the equal protection of the laws." *Hopkins* v. *State*, 193 Md. 489, 496; *Hanauer* v. *Elkins, Pres., U. of Md.*, 217 Md. 213, 219. The appellant contends, in effect, that the State Constitutional qualification deprives him of his "liberty" to disbelieve in God, and discriminates against him as a non-believer.

We are referred to no case directly in point. In general, the cases distinguish between a right to believe, and a right to act on one's belief. *Cantwell* v. *Connecticut*, 310 U.S. 296, 303; *Craig* v. *State*, 220 Md. 590, 599. The first is absolute, the second is not. The petitioner is not compelled to believe or disbelieve, under threat of punishment or other compul- [fol. 25] sion. True, unless he makes the declaration of belief he cannot hold public office in Maryland, but he is not compelled to hold office. The Fourteenth Amendment does not prevent the states from establishing qualifications for office, at least where the qualifications are not based on such an unreasonable and improper classification as to be dis-

criminatory. Cf. *Snowden* v. *Hughes*, 321 U.S. 1, *Wieman* v. *Updegroff*, 344 U.S. 183, and *Slochower* v. *Board of Education*, 350 U.S. 551. In the flag salute case, *Board of Education* v. *Barnette*, 319 U.S. 624, overruling *Minersville Dist.* v. *Gobitis*, 310 U.S. 586, some stress was laid upon the fact that school attendance was compulsory, and criminal penalties were imposed for non-attendance. Stress was also laid upon the lack of any showing of substantial or apparent relation to the public welfare, in the requirement of a salute to the flag of the United States.

In the absence of any direct authority on the point, we find it difficult to believe that the Supreme Court will hold that a declaration of belief in the existence of God, required by Article 37 of our Declaration of Rights as a qualification for State office, is discriminatory and invalid. As Mr. Justice Douglas, speaking for a majority of the Court in *Zorach* v. *Clauson*, 343 U.S. 306, 313, said: "We are a religious people whose institutions presuppose a Supreme Being." The problem here is more basic than in any of the cases cited. An oath, predicated upon a belief in God, is a [fol. 26] regular incident of judicial proceedings. There can be no doubt that at common law an atheist was incompetent as a witness. See Rapalje, *Witnesses*, § 11; 3 Wharton, *Criminal Evidence* (12th ed.), § 750; 6 Wigmore, *Evidence* (3d ed.), §§ 1816-1828. See also *Atwood* v. *Welton*, 7 Conn. 66 (1828); *Thurston* v. *Whitney*, 2 Cush. (Mass.) 104 (1848); *United States* v. *Miller*, 236 Fed. 798 (D. C., Wash.). There has been no constitutional or statutory abrogation of the common law rule in this State.

Article 39 of our Declaration of Rights provides: "That the manner of administering an oath or affirmation to any person, ought to be such as those of the religious persuasion, profession, or denomination, of which he is a member, generally esteem the most effectual confirmation by the attestation of the Divine Being." Article 21 provides that in all criminal prosecutions an accused shall have a right "to examine the witnesses for and against him on oath". It might well be contended that a person convicted upon unsworn testimony, or the testimony of an atheist, would be deprived of due process, or trial according to the "law of the land." Article 36 provides that "as it is the duty of

every man to worship God in such manner as he thinks most acceptable to Him, all persons are equally entitled to protection in their religious liberty; * * * nor shall any person, otherwise competent, be deemed incompetent as a witness, or juror, on account of his religious belief; provided, he believes in the existence of God, and that under His dispensation such person will be held morally accountable for [fol. 27] his acts, and be rewarded or punished therefor either in this world or in the world to come." To the members of the Convention, as to the voters who adopted our Constitution, belief in God was equated with a belief in moral accountability and the sanctity of an oath. We may assume that there may be permissible differences in the individual's conception of God. But it seems clear that under our Constitution disbelief in a Supreme Being, and the denial of any moral accountability for conduct, not only renders a person incompetent to hold public office, but to give testimony, or serve as a juror. The historical record makes it clear that religious toleration, in which this State has taken pride, was never thought to encompass the ungodly.

The Federal Constitution itself is not lacking in references to an oath, or affirmation, as a qualification for office. See Art. I, sec. 3; Art. II, sec. 1; Art. VI, and Amendment IV. See also 5 U.S.C.A., § 16. It would appear to be somewhat paradoxical if a Notary Public, who is given the power to administer oaths and certify thereto, under Code (1957), Art. 68, sec. 3 (see also Maryland Rule 5 c, and Code (1957), Art. 1, secs. 10, 11), might qualify for the office even if he disavowed belief in God and in the sanctity of the very oaths he administers. If it be assumed, as has been suggested, that the real deterrent to false swearing, in our time, is not the belief in God but the fear of prosecution for perjury, we cannot say that the distinction between believers and non-believers is so patently inappropriate as [fol. 28] a security for good conduct, as to make it invidious under the Fourteenth Amendment.

Order affirmed, with costs.

[fol. 30] PROOF OF SERVICE OF NOTICE OF APPEAL
(omitted in printing)

[fol. 31]

IN THE COURT OF APPEALS OF MARYLAND

No. 199

September Term, 1959

ROY R. TORCASO, Appellant,

v.

CLAYTON K. WATKINS, Clerk of the Circuit Court for Montgomery County, Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

I. Notice is hereby given that Roy R. Torcaso, the appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Court of Appeals of Maryland affirming the judgment of the Circuit Court for Montgomery County, entered in this action on June 30, 1960.

II. The Clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following: Petition for Writ of Mandamus, Demurrer, and Memorandum Opinion and Order in the Circuit Court for Montgomery County, all of which were stipulated to be and were printed in appellant's brief to this Court, and the decision of this Court.

[fol. 32] III. The following questions are presented by this appeal:

Is that portion of Article 37, Declaration of Rights, Maryland Constitution which requires "a declaration of belief in the existence of God" as a "religious test" for an "office of

profit or trust," in conflict with the Constitution of the United States, specifically:

"1. The ban in the First Amendment, made applicable to the states by the Fourteenth Amendment, on laws respecting an establishment of religion?

2. The provision in the First Amendment, made applicable to the states by the Fourteenth Amendment, protecting the free exercise of religion?

3. The due process and equal protection clauses of the Fourteenth Amendment?

Leo Pfeffer, c/o American Jewish Congress, 15 East 84th Street, New York 28, New York; Joseph A. Sickles, Carlton R. Sickles, Sickles and Sickles, 3400 Farthing Drive, Silver Spring, Maryland, Attorneys for Appellant.

[fol. 33] PROOF OF SERVICE OF AMENDED NOTICE OF APPEAL (omitted in printing)

[fol. 34] [File endorsement omitted]

IN THE COURT OF APPEALS OF MARYLAND

No. 199

September Term, 1959

ROY R. TORCASO, Appellant,

v.

CLAYTON K. WATKINS, Clerk of the Circuit Court for Montgomery County, Appellee.

AMENDED NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed August 16, 1960

I. Notice is hereby given that Roy R. Torcaso, the appellant above named, hereby appeals to the Supreme Court

of the United States from the final judgment of the Court of Appeals of Maryland affirming the judgment of the Circuit Court for Montgomery County, entered in this action on June 30, 1960.

II. The Clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following: Petition for Writ of Mandamus, Demurrer, and Memorandum Opinion and Order in the Circuit Court for Montgomery County, all of which were stipulated to be and were printed in appellant's brief to this Court, and the decision of this Court.

[fol. 35] III. The following questions are presented by this appeal:

Is that portion of Article 37, Declaration of Rights, Maryland Constitution which requires "a declaration of belief in the existence of God" as a "religious Test" for an "office of profit or trust," in conflict with the Constitution of the United States, specifically:

1. The ban in the First Amendment, made applicable to the states by the Fourteenth Amendment, on laws respecting an establishment of religion?

2. The provision in the First Amendment, made applicable to the states by the Fourteenth Amendment, protecting the free exercise of religion?

3. The due process and equal protection clauses of the Fourteenth Amendment?

4. The ban on religious tests in Article VI?

Leo Pfeffer, c/o American Jewish Congress, 15 East 84th Street, New York 28, New York; Joseph A. Sickles, Carlton R. Sickles, Sickles and Sickles, 3400 Farthing Drive, Silver Spring, Maryland; Bruce N. Goldberg, 4709 Montgomery Lane, Bethesda, Maryland, Attorneys for Appellant.

[fol. 36] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 37]

SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER NOTING PROBABLE JURISDICTION—November 7, 1960

Appeal from the Court of Appeals of the State of Maryland.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

November 7, 1960